No. 12157

United States
Court of Appeals
for the Ninth Circuit

ALEXANDER LAWRENCE ALPERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HONE & LOBREE,
79 Post Street,
San Francisco, California.

Attorneys for Defendant and Appellant.

FRANK J. HENNESSY,
United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the Northern District of California, Southern Division

No. 31834-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALEXANDER LAWRENCE ALPERS,

Defendant.

INFORMATION

(Title 18 USCA Section 396)

First Count:

The United States Attorney charges: That Alexander Lawrence Alpers, (hereinafter referred to as "said defendant"), did, on or about the 28th day of July, 1948, in the City and County of San Francisco, State and Northern District of California, knowingly deposit with an express company, to-wit: Railway Express Agency, for carriage in interstate commerce from the City and County of San Francisco, State of California, to the City of Olympia, State of Washington, a package containing certain matter of an indecent character, to-wit: phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories;

Said package was consigned to The Music Bar, 403 South Washington, Olympia, Washington.

Second Count:

The United States Attorney further charges: That the said defendant did, on or about the 18th day of August, 1948, in the City and County of San Francisco, State and Northern District of California, knowingly deposit with an express company, to-wit: Railway Express Agency, for carriage in interstate commerce from the City and County of San Francisco, State of California, to the City of Dallas, State of Texas, a package containing certain matter of an indecent character, to-wit: phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories;

Said package was consigned to The Blue Bonnet Music Company, 3235 Ross Avenue, Dallas, Texas.

Third Count:

The United States Attorney further charges: That the said defendant did, on or about the 13th day of August, 1948, in the City and County of San Francisco, State and Northern District of California, knowingly deposit with an express company, to-wit: Railway Express Agency, for carriage in interstate commerce from the City and County of San Francisco, State of California, to the City of Olympia, State of Washington, a package containing certain matter of an indecent character, to-wit: phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories;

Said package was consigned to The Music Bar, 403 South Washington, Olympia, Washington.

/s/ FRANK J. HENNESSY,
United States Attorney.
By /s/ DANIEL C. DEASY,
Assistant United States Attorney.

United States of America,
State and Northern District of California,
Southern Division—ss.

Thomas P. Dowd, Jr., being first duly sworn, says that he is a Special Agent of the Federal Bureau of Investigation of the United States Department of Justice, and as such is familiar with the facts alleged in the foregoing Information, which facts are true of his own knowledge.

/s/ THOMAS P. DOWD, JR.

Subscribed and sworn to before me this 22 day of December, 1948.

(Seal) /s/ C. A. TROLLIST,
Depnty Clerk, U. S. District Court, Northern District of California.

WAIVER OF INDICTMENT

I, the undersigned, Alexander Lawrence Alpers, named in the foregoing Information, being present with my counsel in the United States District Court for the Northern District of California, Southern Division, at San Francisco, California, and having been advised of the nature of the charge made against me in the foregoing Information, and of my rights, and understanding that the offenses charged

in said Information are felonies, do hereby, in open court, waive prosecution by indictment, and consent to be prosecuted by the foregoing Information instead of by indictment.

Dated: December 22, 1948.

/s/ ALEXANDER LAWRENCE ALPERS,
Defendant.
/s/ DANIEL C. DEASY,
Witness.
/s/ HASKELL TITCHELL,
Counsel for Defendant.

[Endorsed]: Presented in Open Court and Ordered filed Dec. 22, 1948.

[Title of District Court and Cause.]

MOTION OF DEFENDANT TO DISMISS INFORMATION

Now comes the defendant and not waiving his right to plead not guilty to the Information heretofore filed herein, moves that the Information be dismissed on the following grounds:

I.

That the Information and each and every part thereof fails to allege facts sufficient to constitute an offense under the laws of the United States.

Wherefore, this defendant prays that his motion be granted and that the Information be dismissed.

HONE & HONE,
By /s/ HASKELL TITCHELL,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 22, 1948.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, Dec. 22, 1948.

/s/ ALEXANDER LAWRENCE ALPERS,
Defendant.

HONE & HONE,
By /s/ HASKELL TITCHELL,
Attorneys for Defendant.

/s/ DANIEL C. DEASY,
Assistant United States Attorney.

Approved:

/s/ MICHAEL J. ROCHE,
Judge, United States District Court, Northern District of California.

[Endorsed]: Filed Dec. 22, 1948.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 22nd day of December, in the

year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

ARRAIGNMENT; MOTION TO DISMISS INFORMATION DENIED; PLEA OF NOT GUILTY.

In this case the defendant, Alexander Lawrence Alpers, in open Court, signed a waiver of Indictment. On motion of Daniel C. Deasy, Esq., Assistant United States Attorney, and presenting an Information against Alexander Lawrence Alpers for violation of Title 18 U.S.C.A., Sec. 396, the Court ordered that said Information be filed and made a record of this Court, that bench warrant issue for arrest and appearance of defendant, and that bail for release be fixed in sum of $1000.00.

The defendant Alexander Lawrence Alpers was present in proper person and with his attorney, H. Titchell, Esq. On motion of Mr. Deasy, the defendant was called for arraignment. The defendant was informed as to the filing of the Information by the United States Attorney, and asked if he was the person named therein, and upon his answer that he was and that his true name was as charged, thereupon Mr. Titchell waived the reading of the Information and copy thereof was handed to him. The defendant stated that he understood the charge against him.

Mr. Titchell made a motion to dismiss Information, which motion, after hearing argument of the attorneys, was ordered denied.

The defendant was then called to plead and thereupon said defendant pleaded "Not Guilty" to the Information filed herein against him, which plea was ordered entered.

With the approval of the Court and consent of the Government, defendant waived trial by jury in writing. After hearing counsel herein, it is ordered that this case be continued to December 23, 1948, for trial.

District Court of the United States for the Northern District of California, Southern Division

No. 31834-R

UNITED STATES OF AMERICA,

v.

ALEXANDER LAWRENCE ALPERS.

JUDGMENT AND COMMITMENT

On this 23rd day of December, 1948, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of violation of Title 18 USCA., Sec. 396, (Cts. 1 & 2) defendant shipped in interstate commerce, packages containing matter of an indecent character as charged in Cts. 1 & 2 of Information and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine to the United States of America, in the sum of One Hundred Dollars ($100.00) on Each of Counts One and Two of the Information, making a total fine in the sum of Two Hundred Dollars ($200.00) and in default of the payment of said, that defendant be imprisoned until payment of said fine or until said defendant is otherwise discharged by law.

Count Three Dismissed.

/s/ MICHAEL J. ROCHE,
United States District Judge.

/s/ J. P. WELSH,
Deputy Clerk.

[Endorsed]: Filed and entered this 23rd day of December, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Alexander Lawrence Alpers, 645 Leavenworth Street, San Francisco, California;

Name and Address of Appellant's Attorney: Hone & Lobree, by Haskell Titchell, 79 Post Street, San Francisco 4, California.

Offense: Violation Title 18 USCA 396 by depositing with Railway Express Company for shipment in interstate commerce packages containing obscene, lewd, lascivious and filthy phonograph records. Two counts.

Statement of Judgment: On December 23, 1948, defendant found guilty on two counts of depositing with Railway Express Company for shipment in interstate commerce of package containing obscene, lewd, lascivious and filthy phonograph records. Defendant fined $100.00 upon each count.

The above-named appellant hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated: December 30, 1948.

/s/ HONE & LOBREE,
Attorneys for Appellant.

[Endorsed]: Filed Dec. 31, 1948.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in refusing to dismiss the Information for failure to allege facts sufficient to constitute an offense under the laws of the United States.

2. The court erred in determining that phonograph records were included in and covered by Title 18 USCA 396.

3. That the judgment is void.

Dated: December 30, 1948.

/s/ HONE & LOBREE,
Attorneys for Appellant.

[Endorsed]: Filed Dec. 31, 1948.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

I.

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Information;
2. Defendant's Motion to Dismiss Information;
3. Minute Order of December 22, 1948, denying defendant's motion to dismiss Information;
4. Plea to Information;
5. Waiver of Trial by Jury;
6. Judgment;
7. Notice of Appeal;
8. Statement of Points on which Appellant intends to rely;
9. This Designation.

Dated: December 30, 1948.

/s/ HONE & LOBREE,
Attorneys for Appellant.

[Endorsed]: Filed Dec. 31, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing documents, listed below, are the originals, or true and correct copy of order entered on the minutes of this

Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the Appellant.

Information
Motion of Defendant to Dismiss Information.
Waiver of Jury Trial.
Minute Order of December 22, 1948.
Judgment.
Notice of Appeal.
Statement of Points.
Designation of Record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 11th day of January, A.D. 1949.

(Seal) C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12157. United States Court of Appeals for the Ninth Circuit. Alexander Lawrence Alpers, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 17, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court
of Appeals, Ninth Circuit

No. 12,157

ALEXANDER LAWRENCE ALPERS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S STATEMENT OF POINTS

The points upon which appellant intends to rely and the portion of the record which is material to the consideration of the appeal are the same as those heretofore designated by appellant at the time of filing his Notice of Appeal in this cause and as are specifically set forth in appellant's "Statement of Points" and "Designation of Record" filed in the United States District Court for the Northern District of California, Southern Division, in proceeding numbered 31834-R in the records and files of said court.

Dated: January 27, 1949.

/s/ HONE AND LOBREE,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed January 27, 1949.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12157

ALEXANDER LAWRENCE ALPERS, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of California, Southern Division

Proceedings had in the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, May 16, 1949

Before: DENMAN, Chief Judge, BONE and ORR, Circuit Judges

Order of Submission

Ordered appeal in above cause argued by Mr. Haskell Titchell, counsel for appellant, and by Mr. Daniel C. Deasy, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Tuesday, May 31, 1949

Before: DENMAN, Chief Judge, BONE and ORR, Circuit Judges

Order Directing Filing of Opinion and Filing and Recording of Judgment

Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Court of Appeals for the Ninth Circuit

No. 12,157

May 31, 1949

ALEXANDER LAWRENCE ALPERS, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: DENMAN, Chief Judge; BONE and ORR, Circuit Judges

ORR Circuit Judge:

Appellant was convicted on two counts of an information charging him with knowingly depositing with the Railway Express Agency, for carriage in interstate commerce, certain obscene phonograph records. This, according to the Government's theory, constitutes a violation of certain of the provisions of 18 U. S. C. A. § 396.

That the phonograph records were deposited for carriage in interstate commerce is admitted; that there was inscribed thereon obscene matter is also admitted.

The question for determination is: Are the provisions of 18 U.S.C.A. § 396 broad enough to include phonograph records? The statute, insofar as it is material here, reads: "Whoever shall * * * deposit with any express company * * * for carriage from one state * * * to any other state * * * any obscene, lewd or lascivious, or any filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of an indecent character, * * *".

It is appellant's contention that by enumerating particular classes of obscene matter, Congress evinced a clear intention of limiting the application of the statute and of the general words employed therein, relying on the rule that where a statute employs specific words enumerating specific classes, modes or species, the statute should be construed as being limited in operation and not all-inclusive in scope. The Government admits this rule should be applied in construing the statute under consideration but insists that a proper application thereof demonstrates conclusively that it (18 U.S.C.A. § 396) prohibits the shipment in interstate commerce of phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language. In approaching a consideration of the questions involved in this case we should keep in mind

that the rule of strict construction must be applied and that the doctrine of ejusdem generis is particularly applicable to criminal cases. U. S. v. Salem, 235 U. S. 237; First National Bank of Anamoose v. U. S., 206 Fed. 374. Had Congress intended the statute to be all-inclusive it very readily could have eliminated mention of the special classes and employed the general words "any obscene or indecent matter". The title of the Act at the time of enactment is some indication of the true intention of the Congress in enacting § 396. It read: "Importing and transporting obscene books." This is not controlling but does point up the fact that in all probability Congress intended only a prohibition against the transportation of obscene literature.

A rule of value sometimes employed in construing a statute is to construe it with reference to the evil it was designed to suppress, this in the event "the language is ambiguous and equally susceptible of conflicting construction. But * * * this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute is designed to suppress." United States v. Chase, 135 U. S. 255. The use of phonograph records to transmit obscene matter involves the same mischief which the statute is designed to suppress. It is matter of indecent character, but is entirely different from the methods enumerated.

Two prime methods can be employed in communicating obscene matter to the human mind—visual and auditory representations. This may be accomplished by graphic and lingual representations which may be used with or without mechanical assistance. Prior to 1920 the prohibited matter in the statute fell within the broad classification of visual representation. However, as scientific discoveries progressed it became evident that all visual representations were not ejusdem generis with the species mentioned in § 396 because the enumeration there made required no mechanical contrivance to render them susceptible of being read or observed. Congress, in 1920, added the words "motion-picture film" and in doing so very properly considered that motion-picture film was not within the classification theretofore mentioned in the statute. The motion-picture film is a succession of photographs on a film. The word "photograph" is a combination of the Greek words photos, meaning light, and graphos, meaning writing, and a photograph is a light writing. By the amendment of 1920 the photographic motion picture film was added to a statute theretofore containing the word *writing*. By the amendment Congress demonstrated that the word *writing*, as used in the statute before 1920 was not so used in its broadest sense. Such being the case the question is immediately posed: Why the omission, at the time of the amend-

ment, to mention obscene phonograph records if they be not within the statutory prohibition?

The word "phonograph" is a combination of the Greek words "phone", meaning sound, and graphos, meaning a writing; hence, a phonographic disc is a sound writing. The word *writing*, as used in the statute before 1920, not being sufficiently broad to include *light* writing it certainly did not include *sound* writing. It seems to us the reason Congress did not include *sound* writing in the 1920 amendment was because it was thinking solely in terms of visual representation. Motion picture film at that time had no sound track attachment and was visual representation.

Appellee ingeniously argues that visual representations could not have been the only methods which Congress had in mind when enacting the statute because by use of the Braille system, books are written for use of the blind and certainly the statute contains the word book. We are not impressed with the argument because the probability of finding the evil designed to be suppressed in the Braille system of communication is so extremely remote that it cannot be said to weigh against our conclusion that Congress was thinking only in terms of visual representation. Whether or not a book of that character conveying obscene matter would be a violation of the statute we do not decide.

The Government, in its analysis of § 396, and as a justification of its position that obscene phonograph records are within the prohibition of the statute, points to the word *print* used therein. The Government argues that a phonograph record is a print within the broad meaning of the term. It cites dictionary definitions in support of such an argument.

In the case of United States v. Harman, 38 Fed. 827, the court, in discussing the meaning of the word print used in the statute banning obscene matter from the mails (18 U.S.C.A. § 334), asks the question: "What is meant by print?" and answers by stating that "undoubtedly in its broadest sense it may be an impression of either figures, characters or letters. In its more common sense it is used as applicable to letters."

"It is not necessary, however, that the characters produced should be letters or numerals, or the result of types or stereotypes, or be reading matter, but the term print or printing includes the most of the forms of figures or characters or representations, colored or uncolored, that may be impressed on a yielding surface." Arthur v. Moller, 97 U. S. 365, 367.

"Printing means the impress of letters or characters upon paper or upon other substance * * * and implies a mechanical art." Daly v. Beery, 178 N.W. 104, 106.

"The word print has a wide range of signification; but its ordinary meaning is to impress letters, figures and characters, by

types and ink of various forms and colors, upon paper of various kinds, on some such yielding surface." Forbes Lithograph Co. v. Worthington, 25 F. 899, 900.

The method of producing a phonograph record, as we understand it, is accomplished by a needle cutting the non-resistant surface of a wax disc.[1] After this operation is completed that which is recorded is not understandable until produced as sound through a mechanical device and thus conveyed to the senses in a manner so radically different from that of imparting to the senses the meaning and contents of prints ordinarily associated with the printing art that one cannot say there is not a reasonable doubt that Congress intended to include them. The rule of strict construction requires a holding that phonograph records are not included in the word print.

What we have said disposes of the contention that phonograph records come within the meaning of the term "or other matter of indecent character." To do so would require a holding that the word "matter" relates to a class or species enumerated in the statute. The only class or species to which it would belong, according to the government's contention, would be those covered by the word "print". We have held that the word "print" does not include phonograph records. The general term "or other matter of an indecent character" is not all-inclusive.

Judgment reversed.

(Endorsed:) Opinion. Filed May 31, 1949. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

ALEXANDER LAWRENCE ALPERS, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE

Judgment

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

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[1] Copies are produced from a mold made from the original recording but the requirement of mechanical assistance in order that the recorded matter may be imparted to the senses remains.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed.

(Endorsed:) Judgment. Filed and entered May 31, 1949, Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

No. 12157.

ALEXANDER LAWRENCE ALPERS, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, To Record, Certified Under Rule 38 of the Revised Rules of The Supreme Court of the United States

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing twenty-one (21) pages, numbered from and including 1 to and including 21, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of the Honorable Philip B. Perlman, Solicitor General of the United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of June, 1949.

[SEAL.] (s.) PAUL P. O'BRIEN,
Clerk.

Supreme Court of the United States

No. —, October Term, 1949

UNITED STATES OF AMERICA, PETITIONER,

vs.

ALEXANDER LAWRENCE ALPERS

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 30th, 1949.

HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 30th day of June, 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 844538 14

Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.